

- “1. Whether the Administrative Law Judge exceeded her jurisdiction by entering a Preliminary Hearing Order without proper notice to all parties.
- “2. Whether the Administrative Law Judge exceeded her jurisdiction by entering an Order which was unsupported by any evidence.
- “3. Whether the Administrative Law Judge exceeded her jurisdiction by denying respondent and insurance carrier an opportunity to present evidence at the Preliminary Hearing.”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the briefs of the parties, the Appeals Board finds as follows:

(1) The preliminary hearing was held in this matter on September 17, 1996, before Administrative Law Judge Nelsonna Potts Barnes. The claimant appeared in person and by her attorney, David Farris. Respondent and its insurance carrier appeared not. Claimant requested all previous medical treatment be ordered paid as authorized medical, Dr. Benjamin Poole be ordered as the authorized treating physician, and, if taken off work by Dr. Poole, respondent be ordered to pay claimant temporary total disability benefits.

Since neither the respondent nor its insurance carrier were present, the Administrative Law Judge asked Mr. Farris when the notice of hearing was mailed and to whom. Mr. Farris responded the notice was mailed September 10, 1996, to Miss Diane Schwartzbur, Church Mutual Insurance Company, 2700 Rock Creek Parkway, Suite 108, Kansas City, Missouri 64117-2524. After such inquiry, the Administrative Law Judge found notice was proper and granted claimant's requests for preliminary benefits.

Respondent appealed and argued the Administrative Law Judge exceeded her jurisdiction by entering the preliminary hearing Order without proper notice to the parties. The Appeals Board only has jurisdiction to review a preliminary hearing order, if one of the specific jurisdictional issues listed in K.S.A. 44-534a(a)(2), as amended, has been raised or a party has alleged the Administrative Law Judge exceeded his or her jurisdiction pursuant to K.S.A. 44-551(b)(2)(A), as amended. Whether a party was given proper notice of the preliminary hearing is not a jurisdictional issue which is listed in K.S.A. 44-534a, as amended. Accordingly, if the Appeals Board has jurisdiction to review this preliminary hearing issue, it must be shown that the Administrative Law Judge exceeded her jurisdiction in granting the claimant the requested preliminary hearing benefits.

The preliminary hearing statute, found at K.S.A. 44-534a, as amended, specifically requires notice be given as follows:

"The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing."

Claimant's attorney advised the Administrative Law Judge that the notice of preliminary hearing was mailed to respondent's insurance carrier on September 10, 1996. Therefore, the insurance carrier could not have received the notice sooner than the next day or September 11, 1996. The statute requires the parties to be given at least seven days notice of the date set for the preliminary hearing. The Appeals Board finds that the notice of preliminary hearing sent to respondent's insurance carrier by the claimant in this case was defective. The earliest the respondent's insurance carrier could have received

the notice would have been September 11, 1996, which would have been six days notice instead of the required at least seven days notice.

Accordingly, the Appeals Board finds the respondent's insurance carrier was not given at least seven days notice of the preliminary hearing as required by statute. Therefore, the Administrative Law Judge exceeded her jurisdiction in granting claimant's request for preliminary benefits.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes dated September 17, 1996, is reversed and remanded with directions for the Administrative Law Judge to give at least seven days notice to the parties of the date set for the preliminary hearing.

IT IS SO ORDERED.

Dated this ____ day of November 1996.

BOARD MEMBER

c: David H. Farris, Wichita, KS
P. Kelly Donley, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director